Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services (GS), Inc.

File: B-261603

Date: October 11, 1995

David Holmgreen for the protester.
Lawrence E. Little, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that low offer should have been rejected as unbalanced is denied where there is no evidence that the offer contains enhanced prices.

DECISION

Laidlaw Environmental Services (GS), Inc. protests the award of a contract to Nova Environmental Corporation (Nova) under request for proposals (RFP) No. N00406-95-R-5005, issued by the Department of the Navy, Naval Undersea Warfare Center, Keyport Division, Puget Sound, for the disposal of liquid and solid hazardous fuel.[1] Laidlaw contends that Nova's offer is unbalanced.

We deny the protest.

The RFP contemplated the award of a fixed-price, indefinite delivery/indefinite quantity contract for a base year, with 2 option years, to the low, qualified offeror. The RFP required offerors to provide prices for the pick-up, transport, and disposal of Otto Fuel in 10 combination lots, including the base and option years,[2] established by the type (e.g., tank liquid, liquid or solid waste in 55-gallon drums) and location of the waste. Waste was to be picked up in Washington, California, Hawaii, Mississippi and sites on the East Coast. The RFP included an estimated

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[1]The contractor is to pick up and dispose of Otto Fuel, a waste byproduct in the maintenance of certain torpedoes.

[2]For example, lots I, XI, and XXI, which are at issue here, are for services at Keyport, Washington, for the base year (lot I), option year 1 (lot XI), and option year 2 (lot XXI). Similarly, lots II, XII, and XXII are for the base and option year services at three pick-up points in California; lots III, XIII, and XXIII are for the base and option year services in Rhode Island and Connecticut. The remaining lots are similarly related.

number of gallons or drums for each lot and each offeror was permitted to provide pricing for any combination of lots. The RFP warned that proposals could be rejected as unacceptable if they were unbalanced.

Five offerors submitted offers on lots I, XI, and XII by the closing time and discussions concerning technical and administrative deficiencies were conducted in letter form with all offerors. Four firms submitted best and final offers (BAFO) on lots I, XI, and XXI, including Laidlaw and Nova. The prices submitted by Laidlaw and Nova are as follows:[3]

	Lot I	Lot XI	Lot XXI	Total
Laidlaw	$187,360	$187,374	$193,403	$568,137
Nova	$210,470	$184,820	$154,220	$549,510

The contract for lots I, XI, and XXI was awarded to Nova as the low-priced responsible offeror on April 28, 1995. After filing a Freedom of Information Act request and receiving the abstract and certain contract sections, Laidlaw filed this protest alleging unbalanced pricing.

The concept of unbalancing may apply in negotiated procurements where, as here, price constitutes the primary basis for the source selection. Federal Acquisition Regulation (FAR) § 52.215-16(q); Stocker & Yale, Inc., B-249466.2, Jan. 29, 1993, 93-1 CPD ¶ 88. Unbalanced pricing has two aspects. First, the offer must be evaluated mathematically to determine whether each item carries its share of the cost of the work specified for that item as well as overhead and profit. If the offer is based on nominal prices for some of the work and enhanced prices for other work, it is mathematically unbalanced. The second part of the test is to evaluate the offer to determine whether award to an offeror that has submitted a mathematically unbalanced offer will result in the lowest overall cost to the government. If award to a party that submits a mathematically unbalanced offer will not result in the lowest cost to the government, the offer is materially unbalanced and cannot be accepted. Id.

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[3]The prices submitted by the other offerors ranged from $202,600 to $299,250 for base and option periods.

Laidlaw contends that the award to Nova was improper because Nova's offer is unbalanced. Specifically, the protester asserts that Nova's price for the base year is excessive, and would give Nova an "interest-free loan," creating a monetary windfall if the options are not exercised. The protester takes the position that, because the same level of services are being offered in each performance period, the large pricing differential between Nova's base and option periods is itself prima facie evidence that the bid is mathematically unbalanced. See Westbrook Indus., Inc., 71 Comp. Gen. 139 (1992), 92-1 CPD ¶ 30; Howell Constr., Inc., 66 Comp. Gen. 413 (1987), 87-1 CPD ¶ 455.

Laidlaw also argues that because Nova's offer does not become low until the second month of the second option period, it is materially unbalanced, that is, there is a reasonable doubt that the offer actually represents the lowest cost to the government. Laidlaw notes that in situations where the price differential between the base and the option years is extremely large, our Office has held that the offer should be rejected without consideration of whether the agency intends to exercise the options. Westbrook Indus., Inc., supra. The protester also contends, however, that because the agency never previously procured these services except on a year to year basis, there is no reason to believe the government will exercise the options under this solicitation.[4]

The record simply does not demonstrate that Nova's offer is mathematically unbalanced. Laidlaw's argument is primarily based on a comparison of its own costs, prices and experiences with Nova's. However, pricing involves subjective business judgments and comparison of a competitor's prices with one's own prices is not by itself sufficient to establish price enhancement. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. Despite Laidlaw assertion that Nova's base year prices are overstated relative to Laidlaw's prices, in fact, there is no showing that Nova's base year prices are significantly enhanced or internally inconsistent. Indeed, Nova's base price is not significantly higher than the base prices of any of the offerors, including the other two offerors whose base prices were approximately $202,000 and $299,000. Nova's base price is only approximately 14 percent higher than its first option year price which, in turn, is approximately 20 percent greater than its second option year price. Nova has explained that this pricing pattern is consistent with its current experience under similar contracts, and reflects its ability to negotiate increasingly favorable waste disposal rates from disposal facilities which have recently been experiencing steadily declining demand because of recycling and waste minimization efforts by users.

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[4]The record contains the Navy's unequivocal statement that it intends to exercise all of the options under this contract.

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The differential by itself is to not so gross as to render the offer mathematically unbalanced; we have recognized that a difference of 25 to 50 percent between the base price and the option year prices does not render an offer mathematically unbalanced. See Applicators, Inc., B-215035, June 21, 1984, 84-1 CPD ¶ 656. Here, the base year price is only 36 percent higher than the second option year price. In contrast, in the cases the protester relies on, the disparities are far greater, with at least an 80-percent differential between the base and first option year prices. In short, there is nothing in the record to suggest that Nova's offer contains enhanced prices. Hence, the offer is neither front-loaded, so as to result in a proscribed advance payment, nor mathematically unbalanced; it thus cannot be materially unbalanced.[5] OMSERV, supra.

The protest is denied.

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[5]Laidlaw also speculates that Nova will not successfully perform for the entire contract term, including option periods, because Nova will not be able to negotiate the lower prices for disposal costs that it states it anticipates for the option years and thus will be operating at a loss. However, the ability of Nova to perform the contract is a matter of responsibility, the agency's affirmative determination of which our Office will not review absent a showing of possible fraud or bad faith or that the solicitation contained definitive responsibility criteria that allegedly were not applied. 4 C.F.R. § 21.3(m)(5) (1995). Since Laidlaw has not alleged, and there is no evidence in the record of, bad faith or fraud or the misapplication of definitive responsibility criteria, we will not consider the question of Nova's responsibility. See Integrated Protection Sys., Inc., B-254457.2; B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24.

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